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John Jay Douglass

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# The Judicialization of Military Courts

By COLONEL JOHN JAY DOUGLASS\*

**P**ASSAGE of the Military Justice Act in 1968<sup>1</sup> was the latest in a series of events that have combined to place qualified judges with full judicial powers in military courts-martial. Beginning with the revision of the Articles of War in 1920, when law members were first placed on the courts,<sup>2</sup> the position, prestige, and responsibilities of the judicial members of the courts have gradually increased. Today the military judge functions with powers strikingly similar to those of a federal district judge.<sup>3</sup>

The 1968 legislation changed the title of the judicial member of the court from "law officer" to "military judge,"<sup>4</sup> but this embodied a substantive change of considerable import rather than a mere redesignation. This author served as a law officer from 1955 to 1958; 12 years later he returned to the bench as Area V Military Judge. The differences are striking. During this period, first administratively and later by statute, the military judge became truly independent. By statute and court decision he became the dominant figure in the courtroom, rather than a mere arbiter of documents and evidence.

Superficially, the old position of law officer and the present position of military judge seem quite similar. Like the law officer before him, the military judge: (a) presides over general courts-martial,<sup>5</sup>

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\* A.B., University of Nebraska, 1943; J.D., University of Michigan, 1952; M.A., George Washington University, 1964; Commandant of the United States Army Judge Advocate General's School, Charlottesville, Virginia, 1970-.

1. UNIFORM CODE OF MILITARY JUSTICE arts. 1-140, 10 U.S.C. §§ 801-940 (Supp. V, 1970) [hereinafter cited as UCMJ].

2. Act of June 4, 1920, ch. 227, art. 8, 41 Stat. 759, 788.

3. S. REP. NO. 1601, 90th Cong., 2d Sess. 3 (1968).

4. UCMJ art. 1(10), 10 U.S.C. § 801(10) (Supp. V, 1970).

5. A general court-martial is required to have a military judge. *Id.* art. 16(1), 10 U.S.C. § 816(1). Special courts-martial are not required to have a military judge. *Id.* art. 16(2), 10 U.S.C. § 816(2). A special court-martial without a military judge, however, may not adjudge a bad-conduct discharge, except in situations where physical conditions or military requirements prevent his assignment. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* ¶ 15b (1969) [hereinafter cited as 1969 *MANUAL*]. The goal of the Army is to have "military judges presiding over *all* special courts-martial." Hodson, *Is There Justice in the Military*, ARMY RESERVE MAGAZINE, Nov.-Dec. 1969,

(b) may not later act as staff judge advocate or legal officer to any reviewing authority upon the same case,<sup>6</sup> (c) may not act as military judge if he is an accuser or a witness for the prosecution or has acted as investigating officer or counsel in the same case,<sup>7</sup> (d) may neither consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor vote with the members of the court,<sup>8</sup> (e) is immune from censure, reprimand, or admonishment by any convening authority or commanding officer,<sup>9</sup> (f) may be challenged for cause,<sup>10</sup> and (g) has the same duties to instruct the members of the court.<sup>11</sup>

These similarities between the military judge and the law officer, however, should not obscure the significance of the additional responsibilities imposed by the Military Justice Act of 1968. Additional responsibilities obviously raise new questions. What, for example, are the duties of these new judges? And, how do the new statutory provisions compare with actual practice as tempered both by practical necessity and by the decisions of the military appellate courts?<sup>12</sup>

### I. The Independent Judiciary

A major innovative consequence of the Military Justice Act of 1968 was the creation of an independent trial judiciary for the administration of military justice.<sup>13</sup> In this respect, the act was essentially an

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at 22. A summary court-martial need not have a military judge. UCMJ art. 16(3), 10 U.S.C. § 816(3) (Supp. V, 1970). The jurisdiction of the summary court-martial is limited to adjudication of 1 month confinement, hard labor without confinement for 45 days, restriction for 2 months, or forfeiture of two-thirds of one month's pay. *Id.* art. 20, 10 U.S.C. § 820. Trial before a summary court-martial is consensual on the part of an accused, and if he objects, trial may be ordered by either special or general court-martial, as may be appropriate. *Id.*

6. *Id.* art. 6(c), 10 U.S.C. § 806(c).

7. *Id.* art. 26(d), 10 U.S.C. § 826(d).

8. *Id.* art. 26(e), 10 U.S.C. § 826(e), *amending* 10 U.S.C. § 826(b) (1964).

9. UCMJ art. 37(a), 10 U.S.C. § 837(a) (Supp. V, 1970). See discussion of command influence in text accompanying notes 27-33 *infra*.

10. UCMJ art. 41(a), 10 U.S.C. § 841(a) (Supp. V, 1970).

11. *Id.* art. 51(c), 10 U.S.C. § 851(c).

12. The two military appellate courts are the Court of Military Review, created by the Military Justice Act of 1968, and the United States Court of Military Appeals. UCMJ arts. 66-67, 10 U.S.C. §§ 866-67 (Supp. V, 1970). The Court of Military Review is composed of attorneys, civilian or military, appointed by the Judge Advocate General of the appropriate armed force. It may consider the entire record and decide issues of fact. *Id.* art. 66, 10 U.S.C. § 866. The United States Court of Military Appeals is composed of three civilians appointed by the President, by and with the advice and consent of the Senate, for a term of 15 years. It does not review questions of fact. *Id.* art. 67, 10 U.S.C. § 867.

13. Ervin, *The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 83, 88-91 (1969).

outgrowth of a system administratively established in 1958 by the United States Army, revised in 1962,<sup>14</sup> and in that same year adopted by the Navy.<sup>15</sup> The Military Justice Act of 1968 adopted this system almost in its entirety, thereby laying a statutory foundation for an independent trial judiciary in *all* the services.

### A. General Courts-Martial

The new law still vests the convening authority with responsibility for detail of a military judge to the court-martial.<sup>16</sup> But this is a *pro forma* responsibility, because the convening authority exercises no discretion in choosing the judge. By contrast with past practice, no military judges are now eligible for detail to general court-martial except those certified as qualified by, designated by, assigned by, and directly responsible to the Judge Advocate General of their respective services.<sup>17</sup> In the Army, all military judges of general courts-martial and some military judges of special courts-martial are assigned to the United States Army Judiciary, an independent organization reporting directly to the Judge Advocate General.<sup>18</sup>

The judges are also assigned to particular "judicial areas" within the judiciary, and to particular "judicial circuits" within the judicial areas.<sup>19</sup> The judicial areas and circuits are established and may be dissolved by the Judge Advocate General.<sup>20</sup> At present there are eight judicial areas worldwide and thirty-two circuits. Each circuit includes

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14. Army Reg. 22-8 (Oct. 14, 1964).

15. The Navy and Marine Corps had initiated a pilot program in 1960. SECNAV Notice 5450d (Dec. 6, 1960). On July 9, 1962, the United States Navy-Marine Corps Judiciary Activity came into being. SECNAVINST 5813.6 (May 9, 1962).

16. UCMJ art. 26(a), 10 U.S.C. § 826(a) (Supp. V, 1970). A court-martial is created by a convening order issued by the convening authority. The order designates the kind of court, the place and time it is to meet, the members of the court, and, when appropriate, the members of the prosecution, defense and the military judge. 1969 MANUAL ¶ 36b (1969).

17. UCMJ art. 26(c), 10 U.S.C. § 826(c) (Supp. V, 1970). Article 26(c) provides: "The military judge of a general court-martial shall be designated by the Judge Advocate General . . . of the armed force of which the military judge is a member for detail by the convening authority. . . . A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee . . . and may perform duties of a judicial or non-judicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee."

18. Army Reg. 27-10, para. 9-2(c)-(d) (change no. 3) (operative Aug. 1, 1969).

19. *Id.* para. 9-4.

20. *Id.*

at least one—and usually more than one— “general court-martial jurisdiction.”<sup>21</sup>

The senior judge in each area is responsible for the administration of the military judge program within his jurisdiction.<sup>22</sup> He determines which general court-martial jurisdiction will come under the primary responsibility of each military judge of general courts-martial within his area.<sup>23</sup> In order to “detail” a military judge to a general court-martial, the convening authority does nothing more than contact the military judge who has primary responsibility to preside over general courts-martial in the particular jurisdiction. That military judge then presides at the trial, if he is available. If he is not available, he selects a substitute military judge who will be available to preside, and notifies the convening authority of the substitute’s identity.<sup>24</sup> Thus when the convening authority details a military judge to a general court-martial, he has no opportunity to shop around for a judge whom he thinks may be more complaisant than others. On the contrary, he may detail only the one judge (or his chosen substitute) already designated by the Judge Advocate General.

It is therefore apparent that the structure of the independent judiciary, as established in all services by the 1968 act, completely frees military judges of general courts-martial from control by the convening authority, or by any other local commanding officer. The convening authority may only detail the one judge (or his personally selected substitute) already designated for detail by the Judge Advocate General. And what is even more important, the military judges are answerable only to the United States Army Judiciary, and ultimately to the Judge Advocate General.

### B. Special Courts-Martial

The changes wrought by the 1968 legislation in the area of special courts-martial were undoubtedly the most far-reaching. Particularly noteworthy is the extension of the influence of lawyers to this court level, where so many matters of military discipline are adjudged. In all special court-martial proceedings, the accused is now entitled, as a matter of right, to legally qualified counsel.<sup>25</sup> Moreover, the law requires

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21. *Id.*

22. *Id.* para. 9-6(1).

23. *Id.* para. 9-6(4).

24. *Id.* para. 9-8(a).

25. UCMJ art. 27, 10 U.S.C. § 827 (Supp. V, 1970). This is so “unless counsel . . . cannot be obtained on account of physical conditions or military exigencies.” *Id.*

that a military judge certified by the Judge Advocate General be detailed to all special courts-martial where a bad-conduct discharge may be adjudged.<sup>26</sup>

Within the Army, a number of special courts-martial military judges are assigned to the United States Army Judiciary.<sup>27</sup> The other services have not assigned special court-martial military judges to their independent judiciary organizations, but in all services the certified general court-martial judges may sit in special courts-martial.<sup>28</sup> Due to the great number of special courts-martial and the diversity of locations at which special court-martial judges may be needed, many certified special court-martial judges are not part of the United States Army Judiciary. They are, instead, assigned to local staff judge advocate offices and may be detailed by the convening authority to preside over non-bad-conduct discharge special courts-martial—in addition to their duties as judge advocates in the command.<sup>29</sup> That portion of a "part time" military judge's efficiency report which relates to his judicial functions is prepared by the general court-martial judge in whose judicial circuit he acts.<sup>30</sup>

### 1. "Bad-Conduct Discharge" Cases

Prior to each trial by special court-martial to which it is desired to detail a military judge,<sup>31</sup> the special court-martial convening authority

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26. 1969 MANUAL ¶ 15(b). This is so "except in any case in which a military judge could not be detailed because of physical conditions or military exigencies."

Senator Ervin, a principal architect of the 1968 Act and the prime mover in securing its passage, has stressed the Congressional intent that this exception should seldom be invoked. "The Senate Report emphasizes that military judges must be assigned to all [bad-conduct discharge special courts-martial], if at all possible, because of the seriousness of a punitive discharge, and particularly since, under other provisions of the Act, both the government and the defense will now be represented by lawyers in such trials. [Citing S. Rep. No. 1601, 90 Cong. 2d Sess. S-6 (1968)]. It is contemplated that . . . the unavailability exception will be reserved for cases of legitimate impossibility and that the appellate decisions on this provisions [sic] will so insure." Ervin, *supra* note 13, at 90.

27. Army Reg. 27-10, para. 9-2(d)(1)(change no. 3) (operative Aug. 1, 1969).

28. See UCMJ art. 26(a), 10 U.S.C. § 826(a) (Supp. V, 1970).

29. Army Reg. 27-10, para. 9-2(d)(2) (change no. 3) (operative Aug. 1, 1969).

30. *Id.* para. 9-6(7). The UCMJ provides that "unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge." UCMJ art. 26(c), 10 U.S.C. § 826(c) (Supp. V, 1970).

31. In all special courts-martial cases where a bad-conduct discharge can be adjudged, a military judge *must* be detailed, except in extraordinary situations. See

submits a request for a military judge to the staff judge advocate of the general court-martial convening authority.<sup>32</sup> This request informs the staff judge advocate of the nature of the charge, the estimated duration of the trial, the proposed date, the place of the trial, and the special factors, if any, bearing on the request.<sup>33</sup> The staff judge advocate then notifies the general court-martial military judge of the jurisdiction in all cases that could result in a bad-conduct discharge.<sup>34</sup> In such cases, the request is acted upon as though it were a request for a military judge of a general court-martial, except that a special court-martial military judge assigned to the United States Army Judiciary may be detailed.<sup>35</sup> The procedure for detailing a military judge to a bad-conduct-discharge special court-martial is exactly the same as the detailing procedure for a general court-martial. In each instance, the convening authority has no voice in the matter of choosing the judge.

## 2. "Non-Bad-Conduct Discharge" Cases

In cases to be referred to a non-bad-conduct discharge special court-martial, the military judge of the general court-martial arranges the availability of one of the military judges over whom he exercises administrative responsibility.<sup>36</sup> If none is available, the assistance of the area military judge is sought.<sup>37</sup> If at this point no military judge assigned to the United States Army Judiciary is available, a military judge from the office of the staff judge advocate may be detailed to sit.<sup>38</sup>

This procedure insures that even in cases not involving a bad conduct discharge, "part-time" judges are used only when "full-time" judges are unavailable. As a practical matter, the resident general court-martial military judge establishes a docket system under which the "part-time" special court-martial military judges are made available for assignment to cases without reference back to the staff judge advocate in each case. The expressed view of the Secretary of the Army that a

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text accompanying note 30 *supra*. In cases where a bad-conduct discharge cannot be adjudged, the decision whether or not to detail a military judge is left to what an authoritative commentator terms the "unfettered discretion" of the convening authority. Ervin, *supra* note 13, at 90. This same commentator predicts, however, that use of military judges in non-bad-conduct discharge special courts-martial will steadily increase.

32. Army Reg. 27-10, para. 9-8(b) (change no. 3) (operative Aug. 1, 1969).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

military judge is to be used whenever practicable<sup>39</sup> has led convening authorities automatically to request military judges in those locations where sufficient judicial personnel are available. In such cases, the cumbersome procedure described above becomes unnecessary.

### C. Additional Safeguards Against Command Influence

In addition to the immunity afforded the military judge by the very structure of the judiciary and its administration, the 1968 act sets up various specific statutory safeguards against command influence. The first of these has been adverted to already: Military judges, not being in the chain of command of local commanders, are not rated by them, but rather by their superiors within the United States Army Judiciary.<sup>40</sup> Consequently, the commander cannot adversely affect a full-time military judge's efficiency report and thereby jeopardize his career. Moreover, article 37 of the Uniform Code<sup>41</sup> prohibits a convening authority from unlawfully influencing the action of the court. The prohibited action includes the censure, reprimand, or admonishment of a military judge.<sup>42</sup>

Historically, the military courts have continually proclaimed the independence of the military judge or law officer. In *United States v. Berry*,<sup>43</sup> the court stated that:

The complete independence of the law member and his unshackled freedom from direction of any sort or nature are, we entertain no doubt, vital, integral, even crucial, elements of the legislative effort to minimize opportunity for the exercise of control over the court-martial process by any agency of command.<sup>44</sup>

Recently, in *United States v. Priest*,<sup>45</sup> the law officer had a pre-trial conference with the staff judge advocate concerning one of the charges and specifications, and sought the government's reaction to his contemplated ruling that although the specification did not state the offense charged, it would state a lesser included offense. The court declared that by taking part in such a conference, the law officer "departed from the impartial and independent role assigned to him by the Congress and affirmed by the decisions of this Court."<sup>46</sup> Such a procedure was held prejudicially erroneous.

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39. 69-25 JUDGE ADVOCATE LEGAL SERV. 13 (DA Pam 27-69-25).

40. See note 24 *supra*.

41. 10 U.S.C. § 837 (Supp. V, 1970).

42. *Id.*

43. 1 U.S.C.M.A. 235, 2 C.M.R. 141 (1952).

44. *Id.* at 240, 2 C.M.R. at 146.

45. 19 U.S.C.M.A. 446, 42 C.M.R. 48 (1970).

46. *Id.* at 448, 42 C.M.R. at 50.



In actual practice, military judges consider themselves totally independent of local convening authorities. As a result, the problem of command influence on the military judge rarely arises. Commanders and staff judge advocates are so apprehensive of prejudicing a case by even the appearance of contact with the military judge that the military judge has come to be isolated within the military community. He is not consulted on any legal problems, except those involving court administration. In general, every effort is made to prevent the slightest appearance of command influence. This concern can of course make the military judge's life a lonely one. But as the independent judiciary matures, military judges may become less isolated, and their advice may be sought more often on major legal problems.

## II. Trial by Military Judge Alone

The one feature of the Military Justice Act of 1968 which produced the greatest change in the courts-martial system was the provision permitting defendants to opt for a trial by military judge alone.<sup>47</sup> Neither the authors of this provision nor the administrators of military justice in the services anticipated that the overwhelming majority of defendants before courts-martial would take this option. The statute permits an accused to elect trial by military judge alone in all general courts-martial, and in any special courts-martial to which a military judge has been detailed.<sup>48</sup> This election of trial by military judge alone may be made by the accused only after he knows the identity of the military judge,<sup>49</sup> and it must be in writing.<sup>50</sup>

This provision was modeled after rule 23(a) of the Federal Rules of Criminal Procedure.<sup>51</sup> But the Military Justice Act, unlike the Federal Rules, does not condition the accused's right to waive a jury trial on the consent of the Government (*i.e.*, the convening authority).<sup>52</sup> By excluding the convening authority from the proceedings, the act

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47. See Ervin, *The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 92 (1969).

48. UCMJ art. 16, 10 U.S.C. § 816 (Supp. V, 1970). See text accompanying notes 21-26 *supra* for a discussion of the detailing of military judges to special courts-martial. It is the policy of the Army to attempt to have military judges for all special courts-martial. See notes 4, 26 *supra*. At Fort Knox, Kentucky, since August 1, 1969, all special courts-martial have had military judges. Cutler, *A Year-End Survey of the New Military Justice Act at Fort Knox* (unpublished).

49. UCMJ art. 16(1)(B), 10 U.S.C. § 816(1)(B) (Supp. V, 1970).

50. *Id.* The right to elect trial by military judge exists until the court is assembled. 1969 MANUAL ¶ 53(d)(2). Failure to make the election in writing has been held to be error, although not always prejudicial. Harris, CM 421781 (Feb. 16, 1970); Perry, SPCM 5672 (May 5, 1970).

51. S. REP. NO. 1601, 90th Cong., 2d Sess. 4 (1968).

52. Military Judge Memo. No. 47, 69-21 JUDGE ADVOCATE LEGAL SERV. 18 (DA Pam 27-69-21). The reason for not permitting the convening authority to consent to

sets up another effective barrier to any improper command influence. Most military judges, acting out of an abundance of caution, will ask the trial counsel if he knows of any reason why approval of the accused's request for trial by a military judge should not be granted; but usually the only purpose of this inquiry is to put the Government's views on the record. The military judge alone approves the request for such a trial, and he may refuse the request only when it appears that the accused did not intelligently waive his right to trial by court members.<sup>53</sup>

This rather substantial limitation on the military judge's discretion to deny requests for trial by judge alone does not lessen his responsibility to establish on the record that the accused knows of his right to request trial by judge alone, and (in the event the accused has submitted such a request) to satisfy himself as to the accused's knowledge and understanding of this request.<sup>54</sup> An inquiry in this regard must be made before the court is assembled,<sup>55</sup> and the military judge must insure that the accused's election stems from "a conscious realization by the accused that he has waived trial by court members."<sup>56</sup> The military judge should not rely on a simple statement by defense counsel and accused to the effect that accused has indeed discussed the problem with defense counsel and has made his election with knowledge of the consequences. Rather, the military judge should make an inquiry following a prescribed form. Failure to do so, or the omission of a part of the form of inquiry, may constitute reversible error.<sup>57</sup>

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trial by military judge alone stems from "[t]he command structure in the military [which] presents a possibility of undue prejudicial command influence that is not present in civilian life. In any case the military judge, after having heard arguments from the trial counsel and defense counsel concerning the appropriateness of trial by the military judge alone, will be in the best position to protect the interests of both the Government and the accused." S. REP. NO. 1601, 90th Cong., 2d Sess. 4 (1968).

53. Army Reg. 27-10, para. 9-5(c) (change no. 3) (operative Aug. 1, 1969). The military judge may not refuse a request for trial by him alone to save embarrassment or harassment. This strict rule is appropriate because refusal results in trial by court members, not by jury. Military Judge Memo. No. 47, 69-21 JUDGE ADVOCATE LEGAL SERV. 18 (DA Pam 27-69-21).

54. Military Judge Memo. No. 47, 69-21 JUDGE ADVOCATE LEGAL SERV. 18, 19 (DA Pam 27-69-21).

55. UCMJ art. 16(1)(B), 10 U.S.C. § 816(1)(B) (Supp. V, 1970); 1969 MANUAL ¶ 53(b)(2).

56. Harris, CM 421781 (Feb. 16, 1970).

57. See, e.g., Harris, CM 421781 (Feb. 16, 1970); Caraveo, CM 422669 (May 5, 1970); Perry, SPCM 5672 (May 5, 1970).

In *United States v. Turner*, Civil No. 22,948 (U.S.C.M.A., Nov. 27, 1970) and *United States v. Jenkins*, Civil No. 23,015 (U.S.C.M.A., Nov. 6, 1970), the court held that a lack of inquiry was waived by the accused's failure to object, and indicated that the failure of the military judge to comply with Paragraph 53(d)(2) of the 1969 Manual would be tested under the harmless error doctrine.

This whole inquiry procedure seems to reflect an excessive pre-occupation, so often manifest in new areas of the law, with form as compared to substance. Although the law specifically requires the accused's election to be made in writing, failure to comply with this requirement would scarcely appear prejudicial after the judge has made so extensive an inquiry. On the other hand, after introduction into evidence of a written request which sets forth the facts on which inquiry is required, the oral inquiry is at best redundant. At worst, it seems to reflect unfavorably on the ability and integrity of the defense counsel who prepared the document.

Despite these minor procedural annoyances, however, trial by military judge alone has taken place in the overwhelming majority of cases.<sup>58</sup> The result has been an increase in both the speed of trials and the number of trials that can be handled by each court-martial jurisdiction.<sup>59</sup> It should be noted that giving the accused a statutory election allows him to "forum shop" between a judge and court members. The accused never has an opportunity to "shop" among judges, since he is required to know the name of the detailed judge before he makes his election.<sup>60</sup> Once detailed to a case, a military judge is not normally removed,<sup>61</sup> and changes of venue are rare.<sup>62</sup> The military judge who acquires a reputation for harsh sentences may find himself trying more and more of his cases with members. Conversely, military judges

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58.	3rd Quarter of 1969 [Oct. 31-Dec. 31]	
	Total General Courts-Martial	635
	Military Judge alone	556
	Total Special Courts-Martial	10,603
	Military Judge detailed	8,926
	Military Judge alone	8,508*
	1st Quarter of 1970 [Dec. 31-Mar. 31]	
	Total General Courts-Martial	613
	Military Judge alone	522
	Total Special Courts-Martial	9,247
	Military Judge detailed	8,314
	Military Judge alone	8,032*

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\* Figures based on field reports, compiled by the U.S. Army Judiciary.

At Fort Knox, in 112 special courts-martial only 11 were before a court; of 70 general courts-martial only 4 were before a court. Cutler, *A Year-End Survey of the New Military Justice Act at Fort Knox* (unpublished). The Navy has had 118 out of 196 general courts-martial before a military judge alone, and the Air Force has had 33 percent of its general courts-martial before a military judge alone. Newark News, Sept. 28, 1969, at 26, col. 2.

59. Cutler, *supra* note 58. One general court-martial judge and two special court-martial judges handle all cases at Ft. Knox.

60. UCMJ art. 16(1)(B), 10 U.S.C. § 816(1)(B) (Supp. V, 1970).

61. See 1969 MANUAL ¶ 39(e).

62. See *id.* ¶ 69(e).

known to be lenient are likely to have few trials with court members.<sup>63</sup> Counsels' initial reaction to the newly-conferred right of election was to seek military judges for trial almost automatically without making any attempt to discriminate on the basis of the facts of any particular case. As counsel become better acquainted with the system and with the individual temperaments of different military judges, it seems probable that the election will be less automatic and that trials before a military judge alone will then level off at a lower percentage.

### III. The Article 39a Session

Another long-sought and highly significant improvement in military court procedure authorized by the Military Justice Act of 1968 was the pretrial session, commonly referred to as the "39a session."<sup>64</sup> During the period from 1951 to 1969, the United States Court of Military Appeals came to place greater and greater responsibility for conduct of the trial on the law officer. Proper discharge of this responsibility required the law officer to hold lengthy sessions with accused and counsel for both sides, out of the hearing of the court members. Transcripts of these "out-of-court" hearings were appended as appellate exhibits to the records and were often as voluminous as the trial record itself.

Under the law as it existed prior to 1 August 1969, however, no sessions of the court could be held until the court was convened, and no specific authority was provided for pretrial sessions. As a result, the following cumbersome procedure came into use. First the court members (or jury) would be called, and the court would be convened. Immediately thereafter, an out-of-court session would be held; the court members had to wait long periods of time for the conclusion of hearings

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63. At Ft. Knox, the universal acceptance of the military judge alone reflected a feeling on the part of accused persons and their counsel that they would get a better break from a military judge alone. This feeling is true in the more serious military offenses, such as long AWOL's. In the minor cases, however, the sentences of judges are very similar to those of full courts. Cutler, *supra* note 58.

64. UCMJ art. 39(a), 10 U.S.C. § 839(a)(Supp. V, 1970). The adoption of this procedure was urged by the United States Court of Military Appeals for several years. *E.g.*, *United States v. Kendall*, 17 U.S.C.M.A. 561, 38 C.M.R. 359 (1968); *United States v. Robinson*, 13 U.S.C.M.A. 674, 33 C.M.R. 106 (1963). A 39a session is a part of the trial and must be conducted in the presence of the accused, defense counsel and trial counsel. While it may be used as a "pretrial session," the 39(a) session may also be used at any time during or after the trial to dispose of matters out of hearing of the court, before the judge alone. 1969 MANUAL ¶ 53(d)(1). An election for trial by military judge alone obviates the necessity for a 39(a) session. Goldschlager, *The Military Judge, A New Judicial Capacity*, 11 JAG L. REV. (Air Force) 175, 179 (1969). The purpose of the adoption of the 39(a) session was to conform the military to practice in the United States district courts. S. REP. NO. 1601, 90th Cong., 2d Sess. 9 (1968).

on matters solely for determination by the law officer. From time to time venturesome law officers attempted to hold pretrial sessions on their own before the court had been convened, but in every case this procedure was held erroneous by the appellate courts.<sup>65</sup>

The proper use of the 39a session greatly reduces the time required for the actual trial. In fact in many instances, it will actually enable the judge to dispose of the case before the court members are assembled. At this session the military judge disposes of interlocutory motions raising defenses and objections,<sup>66</sup> and decides such other matters as he may legally rule upon alone. He also holds the arraignment, receives the pleas of accused, disposes of other matters which do not require the presence of court members, and may enter a finding of guilty.<sup>67</sup>

A typical issue decided in a 39a session is the admissibility of a confession.<sup>68</sup> Since this question may now be decided before the court assembles, the members are no longer required to waste considerable time awaiting the decision of the judge. If the judge decides to admit the statement, the issue of its voluntariness may nevertheless be relitigated before the full court.<sup>69</sup>

During a 39a session, the military judge will also examine the convening order, insure that the reporter and counsel have been sworn, take the oath of those not previously sworn, and permit the accused to challenge him for cause.<sup>70</sup> He will also make certain that the accused is fully cognizant of his right to counsel under article 38(b) of the code.<sup>71</sup> Finally, if the accused has requested trial by military judge alone, the judge will consider the request at this time.<sup>72</sup>

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65. *E.g.*, *United States v. Kendall*, 17 U.S.C.M.A. 561, 38 C.M.R. 359, *United States v. Robinson*, 13 U.S.C.M.A. 674, 33 C.M.R. 206 (1963).

66. 1969 MANUAL ¶ 66(b).

67. *Id.* ¶ 53(d)(1); Army Reg. 27-10, para. 2-18 (change no. 3) (operative Aug. 1, 1969).

68. *Id.*

69. *Id.*

70. 1969 MANUAL ¶¶ 61(i), 62 & app. 8.

71. The explanation of the right to counsel has been formalized in MILITARY JUDGES GUIDE (DA Pam 27-15). The military judge must not only inquire as to whether the accused understands this right, but must explain the right again. The requirement is that every record of trial *must* reflect that the accused personally responded to direct questions from the military judge relating to each of the elements of article 38(b) of the Uniform Code as well as his understanding of his entitlements thereunder. *United States v. Donohew*, 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969). This requirement is a frequent source of error and amounts to an elevation of form over substance. Certainly, an accused should be aware of his rights, but the procedure for determining his awareness should be left to the military judge to tailor the inquiry to the individual defendant, with reversal only for abuse of discretion.

72. 1969 MANUAL ¶ 53(d)(2)(b).

One of the questions not answered by either the Uniform Code or the *Manual for Courts-Martial* is whether a 39a session is required in a trial by military judge alone. Strictly speaking, the 39a session is a part of the trial conducted out of the presence of the court members. Thus in trials by military judge alone, where no court members are present, there is no necessity for a 39a session; the military judge may proceed with the trial himself and handle all of the motions as he wishes. Different military judges have handled this situation in different ways, but whatever tack is taken, the question is more a matter of semantics than of substance.

It is contemplated that at the article 39(a) session, counsel will raise all matters capable of final disposition by the military judge alone. Further, certain objections are deemed waived if not raised at the 39a session.<sup>73</sup>

Finally, the 39a session may be held at any time during trial in order to dispose of matters outside the hearing of the court members. For example, the 39a session may be held after the announcement of the sentence in order to dispose of matters raised by appellate authorities, such as questions of jurisdiction or speedy trial.<sup>74</sup>

#### IV. The Guilty Plea

Another problem for the military judge—sitting with or without court members—concerns the guilty plea. The military judge like the federal district judge,<sup>75</sup> is required to make a detailed inquiry into the providency of a guilty plea.<sup>76</sup> Paragraph 70(b) of the *Manual for Courts-Martial* provides that if, after pleading guilty, an accused makes any subsequent statement that raises doubts about the providency of the plea, the judge must renew his inquiry, and may be required to enter a plea of not guilty.<sup>77</sup>

In *United States v. Care*,<sup>78</sup> the law officer simply inquired whether the accused knew the elements of the offense, without troubling to delin-

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73. *Id.* ¶¶ 67(b), 69(a).

74. *Id.* ¶ 53(d)(1).

75. FED. R. CRIM. P. 11.

76. UCMJ art. 45, 10 U.S.C. § 845 (Supp. V, 1970). With respect to any charge, except one involving the death penalty, a plea of guilty may, if permitted by regulations of the Secretary concerned, be entered. 1969 MANUAL ¶¶ 70(a), 70(b)(5).

77. 1969 MANUAL ¶70(b). Nonobservance of paragraph 70(b) will result in reversible error. *E.g.*, *United States v. Williams*, 19 U.S.C.M.A. 334, 41 C.M.R. 334 (1970); *Gonzalez-Otero*, CM 422670 (April 15, 1970); *Alward*, CM 421416 (Dec. 4, 1969).

78. 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

eat the elements of the offense for the accused. The court held that:

[A] plea of guilty may meet the required standards if on the basis of the whole record the showing is clear that the plea was truly voluntary, even if the trial judge has not personally addressed the accused and determined that the defendant possesses an understanding of the law in relation to the facts.<sup>79</sup>

Further, the court noted that the accused in *Care* knew the "acts and intent necessary in the case and consequently his plea was voluntary."<sup>80</sup>

The court pointed out, however, that in future cases the record must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge or the president has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constituted the offense or offenses to which he is pleading guilty.<sup>81</sup> But this requirement is not satisfied by generalized questions such as whether the accused realizes that a guilty plea admits "every element charged and every act or omission alleged and authorizes conviction of the offense without further proof."<sup>82</sup>

Moreover, in the *Care* case it was held that the military judge must personally address the accused, and must advise him that his plea entails a waiver of his privilege against self-incrimination, his right to a trial of the facts by a court-martial, and his right to be confronted by the witnesses against him. This explanation of the consequences of the guilty plea—taken from *Boykin v. Alabama*<sup>83</sup> is rather difficult for an accused to understand. Although the accused will generally state unequivocally that he understands it, a conscientious military judge cannot fail to question in his own mind whether all the consequences are in fact clear to the defendant. This is especially true in cases where the accused pleads guilty to one or more charge and not guilty to others. Based upon the foregoing inquiries and such additional interrogation as the military judge deems necessary, he must, before accepting the plea, make a finding that there is a knowing, intelligent, and conscious waiver.<sup>84</sup>

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79. *Id.* at 539, 40 C.M.R. at 251.

80. *Id.* at 541, 40 C.M.R. at 253.

81. *Id.* 40 C.M.R. at 253.

82. *United States v. Care*, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247, 257.

83. 395 U.S. 238 (1969).

84. *United States v. Care*, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969). *United States v. Palos*, Civil No. 22,991 (U.S.C.M.A., Nov. 6, 1970) held that a failure to make and note the finding for the record was not error. Rather the court inferred the necessary determination from the military judge's interrogation of the accused.

Finally, the military judge, like a federal district judge, must make a finding that there is a factual basis for the plea.<sup>85</sup> This may well come from direct questioning of the accused as to those facts surrounding the incident that originally led to the charges. In a trial before a judge alone where the facts come from oral inquiry of the accused and where the plea is later determined not to be provident, a problem is presented: The statements made by the accused during the oral inquiry cannot be erased completely from the judge's mind in the event that the accused does not wish to make any statement on the merits in the later trial of the case.

### V. Sentencing

When the act of 1968 authorized the military judge to try cases alone, it gave him the concomitant responsibility of determining the sentence. This was perhaps the most awesome change of all from the viewpoint of the officer who came to the bench. For the first time, the military judge has to determine appropriate sentences and guard against disparity between sentences adjudged in similar cases.<sup>86</sup> The *Manual for Courts-Martial* contains a Table of Maximum Punishments<sup>87</sup> prescribed by Presidential Executive Order.<sup>88</sup> This table, however, is merely what its title implies: an *upper limit* on punishment. The *Manual* expressly provides that the table "should not be interpreted as indicating what is an appropriate sentence."<sup>89</sup> Rather the sentence "should be determined after a consideration of all the facts and circumstances involved in the case, regardless of the state of the trial in which they were established."<sup>90</sup>

Although the act of 1968 did not so require, this section of the *Manual* has been modified by a provision enabling the military judge to furnish the court members with supplementary information from the

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85. 1969 MANUAL ¶ 70(a).

86. Military Judge Memo. No. 51, 69-27 JUDGE ADVOCATE LEGAL SERV. 18 (DA Pam 27-69-27).

87. 1969 MANUAL ¶ 127(c).

88. Exec. Order No. 11,476, 3 C.F.R. 132 (Supp. 1970). The power to determine punishment is specifically reserved for the President. UCMJ art. 56, 10 U.S.C. § 856 (1964).

89. 1969 MANUAL ¶ 76(a)(2).

90. *Id.* It should be noted at this point that the military, in the presentencing stage of trial, permits the defense to introduce matters in extenuation and mitigation. Rules of evidence are relaxed, and the accused may make an unsworn statement which may be impeached but not cross-examined. *Id.* ¶ 75(c). The Government may prevent certain matters, including data as to service and evidence of previous convictions. *Id.* ¶ 75(b)(2). In a guilty plea case, matters in aggravation may be presented by the Government. These matters are evidence available and admissible but not introduced before findings. *Id.*



accused's personnel record for consideration prior to sentencing.<sup>91</sup> This *Manual* provision was implemented in Army Regulation No. 27-10 (Change No. 3, 27 May 1969); it states that records of article 15 punishment and the Form 20 (Qualification Record) of the accused may be available to the military judge.<sup>92</sup> If the case is heard before court members, the military judge furnishes the court with any information pertaining to past conduct and performance of the accused. Other matters available to the military judge are: (a) evidence of other offenses or acts of misconduct which were properly introduced in the case, even for a limited purpose before findings; (b) the character of the accused as evidenced in former discharges; (c) the number and character of previous convictions; (d) the fact that a guilty plea is a mitigating factor; (e) the nature and duration of any pretrial restraint; (f) evidence of mental impairment or deficiency; and (g) evidence of any extenuating, mitigating or aggravating circumstances.<sup>93</sup>

In addition to familiarizing themselves with the foregoing evidentiary materials, it has been suggested<sup>94</sup> that judges should visit confinement facilities, and should become familiar with clemency, parole and abatement policies, opportunities for correctional training, and the statistics concerning prevalence of offenses within the judge's jurisdiction. The judge is warned that the latter information should be obtained from a public source, and in a manner consistent with the rights of the accused. Under no circumstances should information be obtained from an ex parte meeting between the military judge and an agent of the Government.<sup>95</sup> It might be argued, of course, that a guided tour through a stockade or a perusal of crime statistics is ex parte information and therefore suspect. Further, military judges may make specific findings and recommendations; *e.g.*, for clemency or for an administrative discharge.<sup>96</sup>

One issue that arises in connection with sentencing is whether the military judge may properly obtain knowledge of a pretrial agreement provision by which the convening authority has promised that the accused will not receive a sentence in excess of a certain maximum.<sup>97</sup>

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91. *Id.* ¶ 75(d).

92. Army Reg. 27-10, para. 2-20 (b) (change no. 3 (operative Aug. 1, 1969)).

93. 1969 MANUAL ¶ 76(a)(2).

94. Military Judge Memo. No. 51, 69-27 JUDGE ADVOCATE LEGAL SERV. 18 (DA Pam 27-69-27).

95. *Id.*

96. See 1969 MANUAL ¶¶ 74(i), 77(a). Military judges do not have power to suspend sentences. See *id.* 97(a).

97. Another unique feature of the military justice system is the practice of plea

The most recent judicial pronouncement on this issue is *United States v. Villa*.<sup>98</sup> There the military judge, during his inquiry as to the providence of the accused's guilty plea, acquired information indicating that there had been a pretrial agreement in which the accused promised to plead guilty in exchange for the convening authority's promise to reduce the charges and limit the maximum sentence. After requesting confirmation of this, the judge was told that such an agreement had indeed been made. He thereupon requested and was given a copy of the agreement.

On appeal, Villa contended that when the Government apprised the judge of the sentence provision in the pretrial agreement, it thereby exerted a "form of command influence" which destroyed the judge's "objectivity." The court interpreted this contention as also challenging the propriety of the judge's knowledge that the charge had been reduced. The essence of Villa's two-pronged contention seems to have been: (1) that the judge would regard the agreed-upon maximum sentence as the sentence *desired* by the convening authority, and would therefore be strongly inclined to impose the maximum sentence; and (2) that the judge would regard a reduced charge as an indication that the accused, who is quite possibly guilty of more than he was charged with, should receive the severest possible sentence. The court rejected each aspect of this contention.

Showing the judge a pretrial agreement that reduces the charges, the court reasoned, is somewhat akin to a Government motion to dismiss one or more of several counts—in each instance, the judge is made aware that the charges have been reduced; yet the latter procedure has never been thought objectionable on that account. The court further observed that in federal courts, knowledge of the elimination of charges is not deemed to prejudice the judge.

Turning to the propriety of a procedure whereby the judge sees the sentence provision of a pretrial agreement, the court concluded that the judge, in order to fulfill his duties, *must* review such a provision where one exists. The military judge is required to satisfy himself that the

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bargaining. An accused may make an agreement with the convening authority to plead guilty in exchange for a promise not to impose a sentence over a specified amount. This agreement is enforceable, and if the court imposes a harsher sentence than provided for in the agreement, the convening authority must reduce the sentence to the agreed limit. *United States v. Brice*, 17 U.S.C.M.A. 336, 38 C.M.R. 134 (1967). If the accused receives a lighter sentence, however, the convening authority cannot increase the sentence to the agreed sentence. Thus, the accused can be assured of a certain sentence, with the chance of getting a better break from the court.

98. 19 U.S.C.M.A. 564, 42 C.M.R. 116 (1970).

accused understands the meaning and effect of his guilty plea. By necessary implication, therefore, the judge must also satisfy himself that the accused understands what maximum sentence he may receive as a result of pleading guilty. Whenever a pretrial agreement changes the maximum sentence, it also changes the accused's understanding of the sentence. Thus the court in *Villa* found a good reason for the military judge to see the sentence portion of a pretrial agreement: he would otherwise be unable to determine whether or not the accused understands it.

As to the more general question whether knowledge of an agreed maximum sentence would prejudice the judge, the *Villa* court decided that it would not. Such knowledge could not induce the judge to impose a sentence greater than the agreed maximum, the court noted, since the greater sentence could have no legal effect. Thus there could be no prejudice to the accused even if the judge considered the agreed maximum sentence too lenient.

But a point of more serious concern was whether knowledge of the agreed maximum sentence would induce the judge to impose that very sentence, instead of some lesser sentence which he might have imposed had he not known of the agreement. Noting that in some cases, changes in conditions occurring between the agreement and the trial (e.g., the accused might "serve part of his sentence" in the form of pretrial confinement) would virtually *compel* imposition of some lesser sentence, the court concluded:

Neither the convening authority nor the military judge would regard the agreement as prescribing a sentence which the military judge could not change without derogating the power and the position of the convening authority.

The court thought, moreover, that both the convening authority and the judge would "treat the sentence provision of an agreement as important only to the effectuation of the agreement, and not as an order or wish on the part of the convening authority to influence the judge. . . ." Hence the court could perceive no appreciable risk of prejudice in this regard.

By laying down the rule that the judge always may—and perhaps always should—see the sentence portion of a pretrial agreement, *United States v. Villa* seems to alter previous policy on pretrial agreements. Previous policy dictated that until the sentence had been announced, the military judge should not normally see any part of a pretrial agreement relative to maximum sentence.<sup>99</sup> Prior to *Villa*, military judges

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99. MILITARY JUDGES GUIDE, ch. 3 (DA Pam 27-9).

did not, as a general rule, review the sentence portion of a pretrial agreement. On the contrary, they customarily directed that this portion be included in an annex to the record that was not available to the judge.

One very recent case indicates that the previous policy has not been totally abandoned, and that there are still some situations in which it is error for the military judge to take account of the Government's view on sentencing. In *United States v. Lund*,<sup>100</sup> the military judge asked the trial counsel to give the Government's opinion as to the proper sentence. The military judge explained: "If we're going to go on the civilian-type practice of law, as we have been instructed we should do, I feel that it is helpful to the court to have the benefit of the views of the Government's counsel." The trial counsel made a recommendation as to sentence, and immediately thereafter the military judge imposed sentence in accordance with the recommendation. The Court of Military Review held that this practice was clearly improper. Not only did it fail to meet the requirements of the *Manual for Courts-Martial*, paragraph 75, with regard to presentencing, but it also caused the trial counsel to violate provisions of that section to the effect that the views of the staff judge advocate or the convening authority as to an appropriate sentence are not to be made known to the court. The procedure was condemned, but no prejudice to the accused was found. The *Lund* decision seems difficult to reconcile with *United States v. Villa*,<sup>101</sup> under which the military judge seems *required* to know the convening authority's (and the staff judge advocate's) view of the appropriate sentence. The approaches represented by the two decisions would clearly conflict if the prosecution's sentence recommendations in both cases had been embodied in a pretrial agreement. The approaches may be reconciled, however, on the basis that in *Lund*, the Government's opinion was requested in regard to a "proper" sentence rather than to a "maximum" sentence. If the Government's opinion had been requested with regard to the maximum sentence which should have been imposed, such an opinion could not prejudice the accused. In either situation, whether the recommendation of a maximum sentence were integrated into a pretrial agreement or were presented verbally to the military judge, it could not exceed the maximum punishment allowed; consequently, a recommendation of a reduced maximum punishment could not but benefit the accused.

One final problem related to sentencing is the inability of the

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100. CM 422605 (Apr. 9, 1970).

101. 19 U.S.C.M.A. 564, 42 C.M.R. 116 (1970).

military judge to suspend a sentence.<sup>102</sup> He may make recommendations to the convening authority for clemency or for a suspension of sentence,<sup>103</sup> but he has no power to compel the convening authority to act in a particular way with regard to a particular sentence. The military judge's recommendation is required to be included in the staff judge advocate's review of the case.<sup>104</sup> Thus the military judge's views are always made known to the convening authority, and should have some influence on the convening authority. Nevertheless, the inability to insure that a sentence will be suspended may lead the military judge to impose a lighter sentence than he otherwise would. It would be preferable for the military judge to have the power to suspend a sentence. Clothed with that power, the military judge could impose a fair sentence for the crime, and could at the same time insure that an individual accused whom he felt deserved a second chance would receive a suspension of sentence which could later be revoked if the accused did not reform. Allowing this practice might give the military judges the necessary flexibility to tailor each sentence to the particular accused.

## VI. Miscellaneous

Some additional matters that are of concern to the military judge, but do not fit neatly into any of the subjects heretofore discussed, require some discussion. One of these is the problem of courtroom facilities. The convening authority is required to provide "an appropriate location and facilities for all courts-martial which he convenes."<sup>105</sup> In the past, the facilities provided have varied greatly in quality. One court-martial may be held in what is the equivalent of a civilian courtroom, while another may be relegated to extremely inadequate facilities in day rooms, mess halls and the like. It is important that the facilities create an atmosphere in keeping with the solemnity of judicial proceedings; much needs to be done in order to achieve this objective. It is significant to note that relative to their installations, military courtrooms in Vietnam are, on the average, superior to those in the United States. The wearing of judicial robes, a practice now authorized for Army military judges, has certainly enhanced the solemnity of the proceedings and has been generally well-accepted by accused and court members alike.

Turning to the mechanics of the proceedings themselves, there are

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102. See 1969 MANUAL ¶¶ 88(e), 97(a).

103. *Id.* ¶ 77(a).

104. *Id.* ¶¶ 77(a), 85(a)-(b).

105. Army Reg. 27-10, para. 2-15(c) (change no. 3) (operative Aug. 1, 1969).

two problems that have recently given the military judge considerable difficulty. The first is the problem of instructions on voting. For a time, the law officer and then the military judge instructed the members on voting by providing them with a sentence work sheet and a set of written voting instructions. Due to the great technicality of certain voting requirements with which military court members must be made familiar, this seemed quite a reasonable procedure. Also, courts-martial often sit for about a month or more hearing various cases, and the voting instructions are repetitive. Notwithstanding the manifest advantages of this practice, the United States Court of Military Appeals has held that the use of written instructions cannot give assurance that the instructions were actually used as a substitute for oral instructions.<sup>106</sup> Accordingly, a number of cases were reversed as to sentence because of this error,<sup>107</sup> and voting instructions must now be given orally.

The other problem is that of "preserving the record." For illustration, in *United States v. Rumpler*,<sup>108</sup> a typographical error in the portion of the record containing the inquiry into accused's guilty plea resulted in a failure to record an admission of the requisite intent. This deficiency necessitated a reversal. In another case,<sup>109</sup> the military judge, instead of reading into the record the information contained on the charge sheet after the findings, examined the document, obtained the statement of defense counsel that it was correct, and merely had it appended to the record. The court held that the information should have been read into the record and the failure to do so was error. However, in this case the error was not deemed prejudicial to the accused and the decision was affirmed.

Such hypertechnical exaltation of form over substance is in reality harmful to an accused; it merely makes for unnecessary delay in the final determination of criminal judicial proceedings. A military judge who must continually preoccupy himself with minor formalities cannot give his full attention to the important substantive issues of each case. Many of the above-mentioned possibilities for technical error are nonexistent in trials by military judge alone, and this fact may further explain the popularity of that procedure.

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106. *United States v. Pryor*, 19 U.S.C.M.A. 279, 41 C.M.R. 279 (1970).

107. *E.g.*, *United States v. Heaston*, 19 U.S.C.M.A. 281, 41 C.M.R. 281 (1970); *United States v. Tripp*, 19 U.S.C.M.A. 509, 42 C.M.R. 111 (1970); *United States v. King*, 19 U.S.C.M.A. 500, 42 C.M.R. 102 (1970); *Gutierrez*, CM 421452 (Apr. 27, 1970).

108. 19 U.S.C.M.A. 479, 42 C.M.R. 81 (1970).

109. *Mackie*, CM 422397 (Mar. 5, 1970).

## VII. Future Developments

The trend over the past half-century toward judicialization of courts-martial—a trend ordained by the Congress and the courts alike—will in all likelihood prove irreversible. Even before the innovations embodied in the 1968 legislation could be digested and assimilated by the military services, the demand arose for more and greater judicialization. But however critical the reformers may be, seldom do they recommend “throwing out the baby with the bathwater.” Instead, almost without exception, the reformers have advocated improvements in the existing system—most particularly, increases in the authority and responsibility of the military judge. This sort of reform can surely be received by military judges as an accolade for their performance on the bench.

It requires no gift of prophecy to predict that the role of the military judge will continue to expand. The next important change may well be the assignment of all military judges to the United States Army Judiciary and the consequent elimination of “part-time” judges, even for special courts-martial.<sup>110</sup> Thereafter, the authority of the judge in the area of sentencing (except possibly in capital cases)<sup>111</sup> will likely be broadened. All agree that the judge should have the power to suspend sentences;<sup>112</sup> at least in the cases where he has the sentencing authority.

In view of the United States Court of Military Appeals' continuing demand for regularization of search authority,<sup>113</sup> the military judge will

110. In a letter to all staff judge advocates dated 6 November 1970, the Judge Advocate General restated his goal “to assign sufficient JAGC officers to the United States Army Judiciary so that all special courts-martial cases can be tried by a full-time judge.

111. See Hodson, *ARMED FORCES J.*, Apr. 11, 1970, at 13.

112. The Courts of Military Review and the United States Court of Military Appeals have the power to grant extraordinary relief, but it is not clear whether or not the military judge has such power. A statutory grant would serve to clear up this matter.

113. Certain recurrent problems related to searches and seizures could probably be solved if current military practice were made to conform more closely to civilian practice. The Court of Military Appeals outlined the basic problems in *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965): “In military law . . . there is no provision for the issuance of a warrant to search. Power to authorize a search is within the province of the commanding officer, including an officer in charge. . . . In this context he stands in the same relation *vis-a-vis* the investigating officer and an accused as the Federal magistrate. And we have so equated him.

“While he issues no warrants, the commanding officer is bound by the same rules in authorizing a search as his [civilian] opposite number; that is, probable cause to believe that the things to be seized are on or within the premises to be searched.

. . . .

“Where an affidavit, establishing the grounds for issuing a warrant, has been

doubtless soon be given magisterial functions. These could include the power to review pretrial confinement, to issue search warrants, and to grant extraordinary relief. Conferment of such powers would make the military judge even more closely resemble a federal district court judge. Perhaps the most important item on the list is the power to issue search warrants. The military judge could easily assume this function and could thereby insure that all searches are conducted only upon probable cause. The upshot would be a reduction in the rather high incidence of illegal searches and resulting reversals. Moreover, most commanding officers would not object to having someone with more suitable training and experience assume the duty of determining when probable cause exists.

The Army judiciary is willing and able to assume these additional duties and responsibilities. Many of the innovations heretofore discussed require action by Congress, and many will be long in coming. In the interim, the military appellate courts and the service's Judge Advocates General can be depended upon to increase the already broadened responsibilities of the military judges. If the competence of individual military judges remains at the high level demonstrated during the first year of the new legislation, the military justice system cannot help but function in a fair and impartial manner, in accordance with the best traditions of American criminal justice.

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sworn to before the proper authority, and is available for review, no problem exists as to the basis for the latter's determination that probable cause existed. . . . But where, as in the military, authorization generally is granted on a mere verbal presentation, the issue [whether probable cause existed] must necessarily be determined through the taking of extensive testimony. This is often a most difficult method of procedure for in most cases trial is held some period of time later and all concerned must rely on their memories to recall just what information was supplied and received. On occasion, the data and testimony available is not sufficient for a proper determination and on appeal we have had to return the case for a rehearing on this issue." 15 U.S.C.M.A. at 294, 35 C.M.R. at 266.

In a case decided one year after *Hartsook*, the court cited the foregoing language and drew the following conclusion: "It is quite apparent that if the civilian practice were followed the problem would be considerably minimized not only on appellate review but more importantly at time of trial where the issue is initially raised. The absence of [documentation establishing probable cause] places a tremendous burden on all the parties and not inconceivably could result in an unjust adjudication of the matter. *We very strongly recommend that the civilian practice be adopted throughout the military.*" United States v. Penman, 16 U.S.C.M.A. 67, 69, 36 C.M.R. 223, 225 (1966) (emphasis added).



